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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RAJAN RAMA AYYAR, Defendant and Appellant.	2d Crim. No. B207838 (Super. Ct. No. 1014375) (Santa Barbara County)

Rajan Rama Ayyar appeals a 12 year 4 month state prison sentence imposed on resentencing after his conviction was affirmed in a prior appeal. In 2005, a jury convicted appellant of 10 counts of grand theft by false pretenses (counts 1, 2, 5-8, 13-16; Pen. Code, § 487, subd. (a))[1], fraud in the sale of securities (count 3; Corp. Code, §§ 25401, 25540), engaging in a fraudulent securities scheme (count 4; Corp. Code, § 25541), and four counts of forgery (counts 9, 11, 12, 17; § 470, subd. (c)) with special findings that appellant took property in excess of $2.5 million (§ 12022.6, subd. (a)(4)) and, on counts 1 through 4 and 6, took property valued in excess of $100,000 (§ 1203.045).

[1] All statutory references are to the Penal Code unless otherwise stated.

We affirmed the conviction but remanded for resentencing. (B180936.) Our Supreme Court granted review and transferred the matter back with directions to vacate our decision and reconsider the sentence in light of *People v. Black* (2007) 41 Cal.4th 799 and *People v. Sandoval* (2007) 41 Cal.4th 825. In an Opinion on Remand, we affirmed the judgment of conviction and remanded for resentencing because former section 1170.1, subdivision (a) provided that the subordinate term could not exceed five years.

On resentencing, the trial court imposed a 5 year upper term on count 4 (fraudulent securities scheme; Corp. Code, § 25541), plus 40 months (8 month consecutive terms on counts 1, 5, 6, 7, and 8; grand theft by false pretenses), and a 4-year taking enhancement (§ 12022.6, subd. (a)(4) for an aggregate sentence of 12 years 4 months.[2] Appellant contends that the trial court erred in denying his motion for new counsel and *Faretta* motion (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562].) In a supplemental letter brief, appellant argues that the trial court committed sentencing errors. We affirm.

Request for New Counsel

On April 10, 2008, appellant appeared with his trial attorney, Gary Dunlap, for resentencing. After several issues were argued, the trial court continued the matter. Appellant said "I'd like to have different representation next time." Dunlap explained that appellant "doesn't want me to be his lawyer" because Dunlap was not being paid for his services.[3]

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[2] Concurrent midterm sentences were imposed on the remaining counts.

[3] The following colloquy occurred:

"THE COURT: Well, it doesn't – I don't think it behooves you to have different representation because Mr. Dunlap is familiar with the case.

"THE DEFENDANT: Yeah, all right.

Appellant claims that his Sixth Amendment rights were violated because the trial court did not appoint substitute counsel. In *People v. Ortiz* (1990) 51 Cal.3d 975, 983, our Supreme Court held that a "defendant's right to discharge his retained counsel . . . is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (See also *People v. Munoz* (2006) 138 Cal.App.4th 860, 870 [trial court must balance the defendant's interest in new counsel against disruption that would arise from substitution].)

The trial court reasonably concluded that the motion was untimely and that appointment of substitute counsel would disrupt the proceedings. Unlike *People v. Ortiz, supra,* 51 Cal.3d 975, there was no break down in communications or claim that Dunlap was not providing competent representation.

"THE COURT: I mean, if you want to have your – who was your appellate counsel? Would you like to have him present?

"MR. DUNLAP: Conrad Petermann.

"THE DEFENDANT: No, not really.

"THE COURT: Okay. So, I mean, it makes sense, I think, to have Mr. Dunlap here. If you want to hire – I'm prepared to have my clerk contact Mr. Peterman and have him here, although that may be – do you know where Mr. Petermann lives?

"MR. DUNLAP: He's in Los Angeles. But this issue was not raised on the appeal specifically.

"THE DEFENDANT: Nothing against Gary, just --

"THE COURT: Well, Mr. Dunlap is familiar with the facts of the case so I'm going to have him here. If we get to a point where you think that you want to explore the possibility of other counsel, then we'll do that."

Appellant argues that representation by uncompensated counsel is ineffective representation. In *People v. Doolin* (2009) 45 Cal.4th 390 our Supreme Court rejected a similar argument and held that a lump sum compensation agreement that included attorney's fees and costs for investigative and expert services did not create a conflict of interest adversely affecting counsel's performance. To assert a Sixth Amendment violation, the defendant must "show (1) counsel's deficient performance, and (2) a reasonable probability that absent counsel's deficiencies, the result of the proceeding would have been different. [Citations]." (*Id*., at p. 417.) The court in *Doolin* disapproved of earlier cases holding that attorney conflict claims under the California constitution may be analyzed under a standard different from that articulated by the United States Supreme Court. (*Id*., at pp. 419-421.) "In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance* – as opposed to a mere theoretical division of loyalties.' [Citation.]" (*Id*., at p. 417.)

Appellant makes no showing that counsel's representation was deficient or that appellant would have received a more favorable sentence had Dunlap been paid for his services. Appellant had "[n]othing against Gary [Dunlap]" but desired different counsel at the next hearing. The trial court did not err in denying the request.

Faretta Motion

At the next hearing on April 28, 2008, appellant filed a *Faretta* motion and substitution of attorney to represent himself. Dunlap advised the trial court that appellant is "certainly capable of doing so if that's his choice. A*nd he's asked me to remain to assist . . . as counsel – or assist counsel*, and I've agreed to do that." (Emphasis added.)

The trial court denied the motion as untimely but stated "I'm going to allow you [i.e., appellant] to say whatever you want to say, so, in effect, you'll be representing yourself insofar as the Court is going to allow you to make whatever arguments you want to make. And you've assumed the responsibility as counsel, I think, de facto in that you

have been filing briefs, and I've been reading the briefs. So, I don't think we need to go through the somewhat formalistic criteria for a defendant who wants to represent himself. I'm going to allow you to say whatever you want. I think Mr. Dunlap, who is going to remain attorney of record, will concur you're fully capable of making arguments. [¶] And to the extent that, Mr. Dunlap, you wish to have Mr. Ayyar make comments and make arguments you can allow him to do that. But I'm not going to relieve you, but, in effect, I'm going to give you both wide latitude to make whatever arguments you choose to make."

Appellant responded, "Your Honor, that's fine" and argued a host of sentencing issues.

Dissatisfied with the result, appellant claims that he was denied the right of self-representation because he was not allowed to "formally represent himself." This misstates the record. The trial court denied the *Faretta* motion in name only and advised appellant that "in effect, you'll be representing yourself."
Appellant submitted briefs and was permitted to argue all sentencing issues.

Appellant makes no showing that Dunlap's presence at the hearing prejudiced appellant's ability to represent himself. "*Faretta* itself dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement. The specific rights to make his voice heard that [appellant] was plainly accorded [citation], form the core of a defendant's right of self-representation." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 [79 L.Ed.2d 122, 132].)

Law of The Case

In a supplemental letter brief, appellant argues that sentence findings made in 2005 estopped the trial court from imposing the taking enhancement (§ 12022.6. subd. (a)(4)) on resentencing. We reject the argument based on the doctrine of law of the case. "Absent a 'manifest misapplication' of the law resulting in 'substantial injustice' [citation] or an intervening change in the law [citation] [a] Court of Appeal decision should stand as the law of the case." (*People v. Stanley* (1995) 10 Cal.4th 764, 787.)

After the verdict was entered in 2005, appellant moved to modify and vacate the verdict on the taking enhancement. The trial court denied the motion, finding that the enhancement was supported by the evidence and that the total aggregate taking exceeded $2.5 million. As an act of leniency, the trial court stated: "I'm going to strike the enhancement in the interest of justice pursuant to Penal Code Section 1385." It was not an acquittal and did not result in double jeopardy bar.[4] (*People v. Hatch* (2000) 22 Cal.4th 260, 273.)

Appellant argues that the $2.5 million taking enhancement was not established by the evidence and the trial court erred in not giving a pinpoint instruction on common plan or scheme. Appellant, however, may not retry the case. "[F]undamental rules of appellate review are specifically designed to preclude the possibility of this type of multiple litigation of the same issue." (*People v. Shuey* (1975) 13 Cal.3d 835, 841.)

In the first appeal, we affirmed the judgment of conviction and remanded for resentencing. (See *People v. Murphy* (2001) 88 Cal.App.4th 392, 396-397 [scope of issues before trial court determined by remand order].) Like a rose, the remand came with thorns and permitted the trial court to impose the taking enhancement. (See E.g., *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614.) Double jeopardy principles do not require that we break the aggregate sentence, which is no greater than the original sentence, into components so as to limit appellant's sentence vulnerability. (*People v. Craig* (1998) 66 Cal.App.4th 1444, 1452.)

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[4] On resentencing, the trial court stated that the reason for striking the enhancement in 2005 was "to reach a sentence that I thought was fair. I in no sense suggested that there wasn't substantial evidence to support the jury's determination that there was a common plan or scheme. That was an issue that was put before the jury, it wasn't put before the Court."

Dual Use of Facts

Appellant, in his letter brief, also contends the upper term sentence and consecutive subordinate term sentence are based on an improper dual use of facts. (Cal. Rules of Ct., rule 4.425, subd. (b)(1).) But only a single aggravating factor is required to impose a upper term (*People v. Castellano* (1983) 140 Cal.App.3d 608, 615), and the same is true when imposing a consecutive sentence (*People v. Davis* (1995) 10 Cal.4th 463, 552.)

In sentencing appellant to the upper term on count 4 (fraudulent securities scheme; Corp. Code, § 25541) the trial court cited the following aggravating factors: the crime was carried out with extraordinary planning sophistication and professionalism; many of the victims were elderly; and appellant violated the fiduciary trust of his clients. (Cal. Rules of Ct. rule 4.421.) The trial court cited other aggravating factors in imposing a consecutive subordinate term: multiple victims, the crimes occurred over a period of time, and different means were used to commit the crimes over a long period of time.

There was no sentencing error. Assuming, arguendo, that some of the aggravating factors overlap because the offenses are part of the same Ponzi scheme, the alleged error is harmless. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684.) Resentencing is not required where there are disparate facts from among those recited which justify the imposition of both an upper term and a consecutive sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 729.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

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Cheryl Barnes Johnson , under appointment by the Court of Appeal, for Defendant and Appellant.

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